APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 96—September Term, 1964.

(Argued October 22, 1964 Decided November 24, 1964.)

Docket No. 28691

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS UNION, AFL-CIO, *Respondent*.

Before:

FRIENDLY, KAUFMAN and ANDERSON, *Circuit Judges*.

KAUFMAN, *Circuit Judge:*

We are called upon here to decide whether certain union action caused an employer to make a "discriminatory" decision, the ultimate effect of which was to "encourage" or "discourage" union membership. The problem is before us on the National Labor Relations Board's petition for enforcement of its order, based upon a trial examiner's findings and conclusions that Local 50, American Bakery & Confectionery Workers Union, AFL-CIO (the Union), violated Section 8(b)(2) and (1)(A) of the National Labor Relations Act, 29 U. S. C. §§ 158(b)(2), 158(b)(1)(A), by causing Ward Baking Company to refuse to reinstate Charles Fisher on the ground that he had procured a withdrawal card from the Union.

Section 8(b)(2) makes it an unfair labor practice for a union "to cause or attempt to cause an employer" to violate Section 8(a)(3) "by discrimination in regard to hire or tenure of employment . . . [which] encourage[s] or discourage[s] membership in any labor organization." Section 8(b)(1)(A) bars unions from restraining or coercing workers in the exercise of Section 7 rights, including the right to refrain from union activities. The Board's order, which we enforce, contains the usual cease and desist and notice provisions, as well as a requirement for back pay.

The sequence of events leading to the present proceeding commenced September 1, 1963, when the Union called a strike at Ward's Bronx plant to protest the management's decision to transfer bread and doughnut production to a New Jersey unit. Fisher, who had been employed at the Bronx plant for almost thirty years, was a Union member, and, as such, joined the strike and picketed for some time. On September 22, however, while the Bronx strike was still in progress, he successfully sought work at Ward's Newark plant—a separate bargaining unit represented by the Union's sister local, Number 84. At that time, he was told by Ward's Newark personnel manager that his Newark job was "temporary" and that he could return to his position in the Bronx when the strike ended.

Despite his "temporary" status, however, Fisher was soon requested to join and pay dues to Local 84. Accordingly, on October 29 Fisher sought and obtained a withdrawal card from the Union, ostensibly so that he might transfer his membership to the Newark local and avoid paying a new initiation fee.

On November 7, the Bronx strike ended, and Ward's Bronx personnel manager, John F. McGuire, met with Union representatives on the following day to arrange the order of recall of workers. Since the bread and doughnut departments had been permanently terminated, the Union and employer conferees faced a complex problem; senior

employees in those departments would have to be assigned other jobs. In light of this fact, and since only about 60 of the approximately 450 employees in the Bronx plant were to be recalled immediately, the parties at the November 8 conference decided to consult a consolidated plant-wide seniority list in determining the order of recall.

With this *modus operandi* agreed upon, Fisher's name was reached in due course at number thirty-five on the seniority list. At this point, Louis Genuth, the Union's secretary-treasurer, advised McGuire that Fisher "had taken a transfer card and . . . was not entitled to recall." As a result of this advice, McGuire scratched Fisher's name from the list, and he was accordingly not rehired.

News of this action did not immediately reach Fisher, and when he was discharged from his Newark job, sometime during the following week, he went to the Bronx plant, seeking reinstatement. It was at this juncture that McGuire advised him that Ward was ready and willing to rehire him, but that the Union had objected.[1] Although Fisher subsequently sought to persuade Union officials to withdraw their objections to his recall, he was finally told that he was no longer a member of the Union and hence out of a job.

The Union does not seriously challenge the foregoing summary of relevant facts, as found by the trial examiner. Rather, in an attempt to justify its conduct, the Union points to a provision of the collective bargaining agreement specifying that seniority rights would terminate if an employee "voluntarily quit." Relying on this provision, the Union contends that Fisher in fact had terminated his employment at the Bronx plant when he received a withdrawal card on October 29.

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[1] To ensure that Ward would continue to abide by Genuth's instructions, the Union's shop steward and one of its business agents separately told McGuire, within the next few days, that Fisher was not to be reinstated because he had received a withdrawal card.

At the outset, we are able to dismiss several of the Union's contentions without extensive discussion. Thus, we cannot attach the requested significance to a provision in the Union's international constitution and bylaws that "a withdrawal card shall signify that the member has voluntarily withdrawn from his local's rolls of active members and has withdrawn from holding or seeking employment within the work or geographic jurisdiction of this International or his local union." As the trial examiner correctly found, this provision had not become a part of the contract between Ward and the Union, either by direct incorporation or by custom and practice.

Neither can we accept the Union's suggestion that its opposition to Fisher's reinstatement was motivated by his alleged statement, in securing the withdrawal card, that he had "quit" the Bronx plant. The trial examiner, having observed the witnesses, did not credit the testimony supporting this theory, and we find his conclusion on this score supported by substantial evidence on the record as a whole. See *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474 (1951).[2]

The difficult issue for our determination is whether Fisher's loss of seniority involved the sort of "discrimination" which "encourages" membership in a labor organization

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[2] There was testimony, for example, that the Union's representatives clearly stated to Personnel Manager McGuire that Fisher's ineligibility for recall stemmed from his request for and receipt of a withdrawal card and nothing else. Moreover, it was undisputed that Fisher did not, before or after the November 8 meeting, inform Ward's Bronx management that he was terminating his employment at that plant. Indeed, McGuire testified that he first learned that Fisher was working in Newark from Genuth, the Union's secretary-treasurer, at the November 8 conference. Finally, Fisher himself testified that he had not been informed that the acquisition of a withdrawal card signified his intention to leave either his job or the Union.

within the meaning of Sections 8(b)(2) and 8(a)(3). Our guidelines for resolving these questions are taken from *N. L. R. B.* v. *Local 294, I. B. T.*, 317 F. 2d 746 (2d Cir. 1963), where Judge Hays wrote that a union does not violate 8(b)(2) unless the "discrimination" which it seeks would constitute a violation of 8(a)(3) if the employer acted without suggestion or compulsion. See also *N. L. R. B.* v. *Local 776, IATSE (Film Editors)*, 303 F. 2d 513, 516 (9th Cir. 1962).

We must first determine, therefore, whether Ward "discriminated" against Fisher by refusing to reinstate him. Central to such an inquiry is a proper definition of the sort of "discrimination" which the Act prohibits. Stated concisely, we believe that an employee is unlawfully "discriminated" against when a distinction is made arbitrarily or without sound basis and to his detriment. See *N. L. R. B.* v. *Miranda Fuel Co.*, 326 F. 2d 172, 181 (2d Cir. 1963) (Friendly, *J.*, dissenting). It is clear to us, moreover, that the provisions of the Labor Act under consideration are meaningful only if they are read to forbid such "discrimination" not only between union members and non-members or between good members and bad members but in all decisions which depend primarily upon union membership consideration. Cf. *Local 357, I. B. T.* v. *N. L. R. B.*, 365 U. S. 667, 682 (Harlan, *J.*, concurring).

When viewed in this context, we believe that the Board was well within the province of its expertise in drawing the inference that an unlawful form of "discrimination" was practiced. See *N. L. R. B.* v. *Erie Resistor Corp.*, 373 U. S. 221, 227 (1963). It is readily apparent to us that Fisher lost his job because the Union caused Ward to enforce a Union rule that was not incorporated in the collective bargaining agreement; his employment would not have terminated without the Union's pressure and cajoling. These acts, it seems to us, establish that Ward's conduct,

resulting from the Union's causation, was arbitrary and without sound basis.

The Union directs our attention to a number of recent cases which it asserts support its position. See *Local 357, I. B. T.* v. *N. L. R. B.*, 365 U. S. 667 (1961) (hiring halls); *Cafero* v. *N. L. R. B.*, —— F. 2d —— (2d Cir. Aug. 27, 1964) (moonlighting); *N. L. R. B.* v. *Miranda Fuel Co.*, 326 F. 2d 172 (2d Cir. 1963) (violation of leave provisions); *N. L. R. B.* v. *Local 294, I. B. T.*, 317 F. 2d 746 (2d Cir. 1963) (work rotation rules). But in our opinion such decisions are not apposite. There is a vital distinction between this case, where the Union's withdrawal card rules were not incorporated in the collective bargaining agreement with Ward, and the cited cases, where Union and employer actions were predicated upon express contract provisions. Indeed, in *Local 357, supra*, the contract specifically provided that there would be no discrimination against employees because of the presence or absence of union membership.

It is of interest that basic to the National Labor Relations Act is an overriding policy to insulate employees' jobs from their organizational rights. To achieve this goal, Sections 8(a)(3) and 8(b)(2) were designed to allow workers to exercise freely their right to join unions, to be good, bad, or indifferent members, or to abstain from joining any union without imperiling their right to a livelihood. *Radio Officers' Union* v. *N. L. R. B.*, 347 U. S. 17 (1954). This is not to say that the Union could not have punished Fisher for circumventing the withdrawal card rules by taking appropriate intra-union disciplinary action. But Fisher's job was shielded from his obligations to the Union, with but a single exception. Thus, the statute explicitly states that a Union commits an unfair labor practice when it causes an employer to discriminate against an employee "on some ground *other than* his failure to tender the periodic dues and initiation fees uniformly required . . ." 29 U. S. C.

§ 158(b)(2). (Emphasis added.) Here there is no question but that Fisher's dues were current.[3]

Finally, it seems to us that the Board could reasonably conclude that Ward, by refusing to reinstate Fisher, was under the foregoing circumstances "encouraging" union membership. See *Radio Officers' Union* v. *N. L. R. B.*, 347 U. S. 17, 51 (1951). It has long been clear that specific proof of intent to encourage union membership is unnecessary where the employer's conduct inherently has such effects. *Radio Officers', supra*, at 45. We cannot say that it was unreasonable for the Board to conclude, especially in light of its expertise in labor disputes,[4] that Ward's subservience to the Union in refusing to reinstate Fisher because he had secured a withdrawal card would serve in the future to encourage fellow workers to remain *active* Union members during a strike and to discourage transfers to sister locals.

Several additional contentions by the Union require brief discussion. We are told that *Local 294, supra*, and *Miranda Fuel, supra*, compelled the Board to carry the burden of proving the Union's illegal motivation. From this premise, the Union argues that it did not intend to cause forbidden discrimination because it honestly believed Fisher had "quit." But the Union reads too much into our previous decisions. In *Local 294* we simply held that a union does not commit an unfair labor practice by inducing an employer to make a *non-discriminatory* decision against an

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[3] If Fisher had fallen behind in dues payments to Local 50 while working in Newark, the first proviso of § 8(a)(3) might, as the dissent suggests, be applicable. But that situation is not before us; the proviso speaks of failing to tender periodic dues payments, and not in terms of suspending a future "obligation" to pay dues.

[4] "The Board knows the facts of life in the labor world better than we ever can; we ought not upset its conclusion as to 'encouragement' unless we can say this is without rational basis." *N. L. R. B.* v. *Miranda Fuel Co.*, 326 F. 2d 172, 184 (Friendly, J., dissenting).

employee. Its teaching, therefore, does not apply to a case in which, as here, discrimination is established. *Miranda Fuel* is not in point for somewhat different reasons. It is true that Judge Medina's scholarly opinion suggests that an unfair labor practice is committed only if discrimination is "deliberately designed" to encourage union membership. But, in order to give that language its proper weight, it must be placed in context. When we do so, we note that the real issue in *Miranda* was whether a union committed an unfair labor practice by arbitrary action which "could not conceivably have been thought to encourage union membership, because [the employee's] demotion affected union and non-union men alike," 326 F. 2d at 176; the union's motivation, as we read the case, was not really in issue. Finally, as we have already indicated, these cases must be read in the light of the Supreme Court's holding in *Radio Officers' supra*, that specific proof of intent is unnecessary where, as here, conduct inherently encourages union membership.

As a final measure, the Union argues that it did not "cause or attempt to cause" forbidden conduct because Ward could have resisted its demand that Fisher lose his seniority by seeking arbitration. Such a contention borders on the frivolous. First, substantial evidence supports the trial examiner's finding that Ward acted *solely* because of the suggestions and advice of the Union's representatives at the November 8 conference and in subsequent conversations with Personnel Manager McGuire. This finding establishes the requisite causation under Section 8(b)(2). Cf. *N. L. R. B.* v. *International Union of Operating Engineers*, 216 F. 2d 161 (8th Cir. 1954). Secondly, it seems to us that Section 8(b)(2) would have no force if a union's conduct were excusable simply because the employer *might* have resisted the union's desires by resorting to arbitration. Speculation as to the will or ability of a given employer to withstand union pressure can have no place in an area of the law already overburdened with hypothetical conjectures remote from the realities of industrial existence.

The Board's order is enforced.

FRIENDLY, *Circuit Judge* (dissenting):

The trial examiner's report, which the Board adopted, holds that a labor organization having a valid union security contract violates the first clause of § 8(b)(2), forbidding it to cause an employer by discrimination to encourage union membership, if it causes the employer to withdraw seniority from an employee who has taken advantage of a bylaw permitting him to avoid the payment of dues if he is willing to sacrifice his position as an active union member and as an employee. No administrative expertise or appropriate judicial deference to it can square such a result with a reasonable construction of the statute.

The supposedly offending provisions are those in Article XIV of the Local's and Article XIX of the International's By-Laws, both relating to withdrawal cards. Having the right to insist that a member continue the payment of his dues under any and all conditions or forfeit his membership, the union settled for something less. A member might withdraw "from his local's rolls of active members" and thereby have his obligation to pay dues suspended while ceasing to participate in any union affairs. However, he could join any sister local or resume active membership on his own without paying an initiation fee. Assumption of this status naturally carried a penalty—the member would be deemed to have withdrawn from holding or seeking employment within the local's jurisdiction.

It is undeniable that this condition "encourages" a member not to avail himself of the option but rather to continue as a dues-paying member of the local under whose jurisdiction he has been working. But § 8(a)(3) clearly contemplates that this "encouragement," although no other, is permissible where there is a valid union security contract.[1]

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[1] Boston's case, dealt with in *Radio Officers' Union* v. *N. L. R. B.*, 347 U. S. 17, 42 (1954), is distinguished by the absence of a valid union security contract, as well as by the fact that the union did not terminate Boston's status as a member.

Congress' determination "to insulate employees' jobs" from union efforts to reward "good" members or to punish "bad, or indifferent" ones, *Radio Officers' Union* v. *N. L. R. B.*, 347 U.S. 17, 40 (1954), was paralleled by its recognition of "the validity of unions' concern about 'free riders,' i.e., employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union, and gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason," 347 U. S. at 41. Here the first proviso of § 8(a)(3) was met and the second was inapplicable.

When the first proviso allows an employer and a labor organization to require "membership therein" as a condition of employment, it surely permits a requirement of dues-paying membership, and the collective bargaining agreement between Ward and the union demanded exactly that.[2] Fisher, by acquiring a withdrawal card, voluntarily ceased to be a dues-paying, participating member of the union; the union bylaws already mentioned unequivocally provided this route for severing these basic ties with the union,[3] and Fisher took it as surely as if he had submitted a letter of resignation. By so doing, he laid himself open to job and consequent seniority loss under the security clause. I cannot believe anything should turn on the inept language specifying withdrawal from the "rolls of *active*

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[2] "All present employees shall, as a condition of continued employment, maintain their membership in the Union [Local No. 50] during the life of this agreement through regular payment of dues to the Union."

[3] "A withdrawal card shall signify that the member has voluntarily withdrawn from his local's rolls of active members and has withdrawn from holding or seeking employment within the work or geographic jurisdiction of this International or his local union. The holder of a withdrawal card shall be exempt from the payment of union dues and shall not be permitted to participate in local union meetings."

members" when the remainder of the section made it clear that membership itself was being abandoned, saving only the initiation fee protected by another section.

The second proviso says, "That no employer shall justify any discrimination against an employee for nonmembership in a labor organization . . . (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condtion of acquiring or retaining membership." The language, supported by the legislative history (H. R. 3020, 80th Cong., 1st Sess. § 8(d)(4) (1947) (passed by the House); S. Rep. No. 105, 80th Cong., 1st Sess. 20 (1947)), makes it clear that "terminated" refers to actions initiated by the union, such as expulsion, not by the employee.[4]

I would deny enforcement.

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[4] This answers the point made in the footnote to the majority opinion which relies on a partial quotation of similar language in the second clause of § 8(b)(2).

APPENDIX B

Decision and Order

On March 26, 1963, Trial Examiner Ivar H. Peterson issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent Union had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom, and take certain affirmative action, as set forth in the Intermediate Report attached hereto. Thereafter, the Respondent and the General Counsel filed exceptions and supporting briefs.[1]

Pursuant to the provisions of Section 3(b) of the Act the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, and the entire record in the case, including the exceptions and briefs, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[2]

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[1] The Respondent's request for oral argument is hereby denied as the record, exceptions, and briefs adequately present the issues and position of the parties.

[2] As set forth in the Intermediate Report, the Respondent's bylaws and the constitution of its International each contain a provision which states: "A withdrawal card shall signify that the member has voluntarily withdrawn from his local's rolls of active members and has withdrawn from holding or seeking employment within the work or geographic jurisdiction of this International or his local union." In view of the specific findings of the Trial Examiner, which we are adopting, that the provision in question was not in the contract between the Respondent and the Company and, therefore, cannot avail the Respondent as a defense, we do not reach or pass upon the issue of the legality of such a provision, if it were a part of the contract.

ORDER

The Board adopts as its Order the "Recommended Order" of the Trial Examiner with the following amendments:

(1) Paragraph 2(a) of the Recommended Order shall be amended to read as follows:

> Notify Ward Baking Company in writing, and send a copy thereof to Charles Fisher, that it has withdrawn the objection to the reinstatement of the said Charles Fisher which was expressed by the Union beginning November 8, 1962, and that it has no present objection to his reinstatement.

(2) The paragraph of the Notice[3] beginning "WE WILL notify etc." shall be amended to read:

> WE WILL notify WARD BAKING COMPANY that we withdraw our objection to the reinstatement of Charles Fisher, which we expressed beginning November 8, 1962, and that we presently have no objection to his reinstatement, and we will serve a copy of said notice on Charles Fisher.

Dated, Washington, D. C., June 27, 1963.

PHILIP RAY RODGERS, *Member,*
JOHN H. FANNING, *Member,*
GERALD A. BROWN, *Member,*
(SEAL) NATIONAL LABOR RELATIONS BOARD

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[3] Below the double line, the penultimate sentence is changed to read "This Notice must remain posted for 60 consecutive days from the date of posting, * * * " instead of stating "60 consecutive days from the date hereof."

Intermediate Report and Recommended Order

Statement of the Case

Upon a charge filed on November 16, 1962,[1] by Charles Fisher, the General Counsel of the National Labor Relations Board, by the Regional Director for the Second Region, issued a complaint on December 28, alleging that Local 50, American Bakery & Confectionery Workers Union, AFL-CIO, herein called the Respondent or the Union, had engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act in that it had caused Ward Baking Company, herein called the Company, to discriminate against Fisher in violation of Section 8(a)(3) by causing the Company to refuse to reinstate Fisher. In its answer, the Respondent denied the commission of any unfair labor practices.

Pursuant to notice, a hearing was held before me, as duly designated Trial Examiner, in New York, New York, on January 24, 1963. The General Counsel and the Respondent were represented by counsel and participated in the hearing. Counsel for each of the parties presented oral argument at the conclusion of the hearing, and briefs have been received from both, which have been considered.[2]

Upon the entire record, and from my observation of the witnesses, I make the following:

Findings of Fact

I. The Business of the Employer

Ward Baking Company, a New York corporation with its principal office at 475 Fifth Avenue, New York, New York, is engaged in the production, sale and distribution

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[1] All dates refer to 1962, unless otherwise indicated.

[2] By order dated February 18, 1963, a stipulation of the parties and an attached agreement were received in evidence as Joint Exhibit 1-A.

of bakery goods and related products at various plants in New York, New Jersey and Maryland, including its Bronx, New York, plant which is involved in this proceeding. During the past year, which is a representative period, the Company shipped products valued in excess of $50,000 from its plants to States other than the State in which the plants are located. I find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Local 50, American Bakery & Confectionery Workers Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

At issue here is the legality of the Union's action in causing the Company to refuse to reinstate the complainant, Charles Fisher, at the conclusion of a strike, confined to the Company's Bronx plant which began September 1 and ended November 7. Fisher, who had been employed at the Bronx plant since November 1932, most recently in the maintenance department, was a member of the Union, joined the strike, and picketed. On September 22, during the strike, he obtained employment at the Newark plant of the Company, which is a separate bargaining unit represented by the Union's sister local, Local 84. On October 29 Fisher requested and obtained a withdrawal card from the Union. The strike ended on November 7 with the signing of a settlement agreement by which the basic agreement that had terminated on August 31 was renewed, effective September 1, with modifications. The following day, November 8, representatives of the management and the Union met for the purpose of arranging for the recall of employees, which involved problems of job placement as

well as order of recall occasioned by the fact that certain operations of the Company at the Bronx plant were being curtailed or discontinued. Since only about 60 out of the approximately 450 employees were to be recalled immediately, the parties at the November 8 conference used a consolidated plantwide seniority list in determining the order of recall. When Fisher's name (35th on the list) was reached, the Union took the position that he had obtained a "transfer" or withdrawal card and was not entitled to recall. Accordingly, his name was scratched on the list and he was passed over. Sometime during the week following November 8, Fisher was informed that he was being laid off from his job at the Newark plant. He then went to the Bronx plant to inquire about reinstatement. John F. McGuire, the personnel manager, who had participated in the November 8 conference, told him that although the Company was willing to put him back to work in the Bronx plant the Union objected. Within the next few days the Union's shop steward, Angelo Vangone, and business agent, Jack Killoran, separately told Personnel Manager McGuire that Fisher was not to be brought back to work because he had obtained a withdrawal card from the Union.

The complaint alleges that the Respondent caused the Company to discriminate against Fisher because Fisher "had obtained a withdrawal of membership card from Respondent" and/or "worked for Ward during the strike." The Respondent, while not disputing that it objected to Fisher's reinstatement, contends that he quit his employment at the Bronx plant and, in consequence, lost his seniority and his right to be reinstated upon termination of the strike. In support of its position, the Respondent relies upon a provision in the international constitution (article XIX, section 1) and in its bylaws (article XIV, section 1) which states: "A withdrawal card shall signify that the member has voluntarily withdrawn from his local's rolls of active members and *has withdrawn from holding or seeking employment within the work or geographic juris-*

diction of this International or his local union'' (Emphasis supplied). Admittedly, this provision had not been incorporated into the collective-bargaining agreement with the Company; however, the Union argues in its brief that by custom and practice the withdrawal card provisions quoted above "had become part of the seniority agreements of the local union in its relations with the employers with whom it had collective bargaining agreements." In addition, and apart from its reliance on the withdrawal card provision in its bylaws, the Respondent urges that Fisher in fact had quit his job at the Bronx plant because he so informed the Union on October 29 when he obtained his withdrawal card.

Fisher testified that when he was hired by the Newark personnel manager he was told that the job was temporary and that he would have his job at the Bronx plant when the strike ended. It is undisputed that Fisher did not, prior to or after the November 8 meeting, inform the Bronx management that he was quitting his employment at that plant; indeed, Personnel Manager McGuire testified that he first learned Fisher was working at the Newark plant during the November 8 conference when he was so informed by Louis Genuth, secretary-treasurer of the Respondent. Moreover, McGuire stated that but for the Union's objection Fisher "would have been advised to report either November 11th or the 18th when the bulk of the other employees were notified to report." Tim McIntyre, a business agent of the Respondent, testified that Fisher, when he appeared at the Union's offices on October 29 to secure a withdrawal card, stated to McIntyre that his job at the Newark plant was permanent and, in response to McIntyre's inquiry whether that meant he had left his employment at the Bronx plant, answered that it did. McIntyre further testified that he apprized Secretary-treasurer Genuth, Shop Steward Vangone, and Business Agents Killoran and Huller of the substance of his conversation with Fisher, telling them that Fisher "had told me that he was

quitting his job in the Bronx, and that he had come over to our office for a withdrawal card to Local 84."

The purport of McIntyre's testimony regarding his conversation with Fisher on October 29, as summarized above, is that Fisher's statement that he had quit the Bronx plant, rather than his action in securing a withdrawal card, was the significant factor motivating the Union's subsequent opposition to his reinstatement. However, at the November 8 conference, which was not attended by McIntyre, Genuth told Personnel Manager McGuire, when Fisher's name was reached on the seniority list, according to McGuire's uncontradicted testimony, that Fisher "had taken a transfer card and * * * was not entitled to recall * * *." A few days later, again as testified by McGuire and not controverted by any witness of the Respondent, both Shop Steward Vangone and Business Agent Killoran informed McGuire that Fisher was not to be reinstated because he had taken out a withdrawal card. In these conversations with McGuire, the Union's representatives clearly stated that Fisher's ineligibility for recall stemmed from his having obtained a withdrawal card; they did not attribute his loss of employment rights to any other independent act or statement on his part. I credit the testimony of Fisher and McGuire and find that Fisher did not tell McIntyre that he had quit the Bronx plant or that his job at the Newark plant was permanent; I further find that the Union's representatives told Personnel Manager McGuire that Fisher was not to be recalled because he had taken out a withdrawal card from the Union and thus had quit his employment.[3]

[3] Fisher testified that he came to the Union's office on October 29 to pay his dues; that he asked McIntyre when he thought the strike might end, to which McIntyre replied, "I don't know; maybe never"; and that he then determined to secure a withdrawal card. McIntyre, on the other hand, testified Fisher told him he had been sent by a delegate of Local 84 to obtain a withdrawal card. On this aspect of their conversation I credit McIntyre

(c) Seniority rights shall terminate if an employee:

(I) voluntarily quits

(II) is discharged for just cause

(III) fails to return to work within (7) days notice by registered or certified mail to his last known address (unless unable to because of illness of which the company receives written notice). A copy of the company's notice shall be simultaneously served by mail upon the Local Union.

(IV) is laid off for the following period of time: employee with less than 3 years continuous service—60 days.

employees with more than 3 years continuous service and less than 4 years—90 days.

employees with more than 4 years continuous service and less than 5 years—120 days.

employees with more than 5 years continuous service—180 days.

(V) In the event of the permanent shut-down of a department of any plant the employee who is laid off shall retain seniority for a period of one year for purpose of recall only.

There is nothing in the foregoing contractual provision that can reasonably be said to have had the effect of terminating Fisher's seniority. He had not voluntarily quit, had not been discharged for cause, had not failed to return

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and find that Fisher's purpose in visiting the office was to arrange to transfer his membership to Local 84. Although the record does not disclose whether Local 84 had a union shop agreement at the Newark plant, I infer that Fisher, having been employed there just over 30 days, had been requested to pay dues to Local 84 and, in order to do so without paying an initiation fee, found it necessary to obtain a withdrawal card from the Union.

pursuant to notice of recall, nor had he been in layoff status for the required period. I find, therefore, in accord with this seniority provision and McGuire's testimony set forth above, that Fisher had not lost his seniority, was eligible for recall, and would have been recalled on November 11 or 18, but for the Union's insistence that he was not entitled to reinstatement. Nor is there support in the record for the contention that the provision in the Union's bylaws, that by obtaining a withdrawal card a member thereby signifies that he "has withdrawn from holding or seeking employment within the work or geographic jurisdiction of * * * his local union," had become a part of the contract between the Company and the Union, either by direct incorporation therein or by custom or practice. Secretary-treasurer Genuth admitted that the bylaw provision had not been incorporated into the agreement. Testimony adduced by the Union to the effect that employees (either of the Company or other employers subject to the same basic agreement) who had obtained withdrawal cards and were thereafter reemployed, had seniority dating only from the date of rehire, falls far short of establishing that the act of obtaining a withdrawal card, in and of itself, operated to terminate such seniority as they had accumulated prior to taking out a withdrawal card. I find that there was no contractual arrangement between the Company and the Respondent whereby the issuance of a withdrawal card to an employee, without more, served to terminate the employment relationship. As to Fisher, I find that the Respondent caused the Company to refuse to reinstate him because he had obtained a withdrawal card, and that in so doing the Respondent was not acting in compliance with any contractual provision but in derogation of Fisher's rights under the operative agreement.[4]

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[4] The complaint further alleged that the Respondent caused Fisher not to be reinstated because he worked at the Company's Newark plant during the strike. Although the matter is by no means free from doubt, I am not persuaded that an inference to that effect is sufficiently supported by the record.

The refusal of the Company to reinstate Fisher was the direct result of the position taken by the Respondent's representatives in the November 8 conference with Personnel Manager McGuire, and in subsequent conversations with him. In thus insisting that the procurement of a withdrawal card from the Union was the equivalent of a voluntary quit, a result not sanctioned by the contract but indeed contrary to its provisions governing loss of seniority, the Respondent caused the Company to discriminate against Fisher. The Respondent's real purpose, I find, was to enforce as a condition of employment its bylaw provision that by obtaining a withdrawal card a member withdrew "from holding or seeking employment" within the work of geographic jurisdiction of the Respondent,[5] and thereby to encourage employees to remain active members of the Union. Accordingly, I find that the Respondent caused the Company to discriminate against Fisher in violation of Section 8(a)(3) of the Act and that thereby the Respondent violated Section 8(b)(2) and (1)(A) of the Act.[6]

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Employer described in section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes

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[5] Stated otherwise, what the Union's position comes down to is that only active members, excluding those who have taken out a withdrawal card, are entitled, under this provision in its bylaws, to hold or seek employment within the Union's work or geographic jurisdiction. This, it seems to the undersigned, is tantamount to attempting to maintain closed shop conditions.

[6] See *Brunswick-Balke-Collender Co.*, 135 NLRB 574; *Local 12, International Union of Operating Engineers, AFL-CIO (Engineers Limited and Pacific Pipeline Construction Company)*, 135 NLRB 1252.

burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent caused the Employer herein to refuse to reinstate its employee, Charles Fisher, in violation of Section 8(a(3) of the Act, thereby engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act. It will be recommended that the Respondent notify the Employer, in writing, and serve a copy upon Fisher, that it withdraws its objection to the reinstatement of Fisher at the Bronx plant. It will also be recommended that the Respondent make whole Fisher for any loss of pay he may have suffered as a result of the discrimination against him, such backpay liability to terminate 5 days after notification to the Employer that it has no objection to Fisher's reinstatement. The amount of backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289, with interest as prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB No. 97.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. Ward Baking Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent, Local 50, American Bakery & Confectionery Workers Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By causing Ward Baking Company to refuse to reinstate its employee, Charles Fisher, in violation of Section

8(a)(3) of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Recommended Order

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, it is recommended that the Respondent, Local 50, American Bakery & Confectionery Workers Union, AFL-CIO, its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Causing of attempting to cause Ward Baking Company to discriminate against its employees in violation of Section 8(a)(3) of the Act, as amended by the Labor-Management Reporting and Disclosure Act of 1959.

(b) In any like or related manner restraining or coercing employees of Ward Baking Company in the exercise of rights guaranteed them in Section 7 of the Act, as amended by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Notify Ward Baking Company, in writing, and send copy thereof to Charles Fisher, that it has no objection to the reinstatement of the said Charles Fisher.

(b) Make whole Charles Fisher for any loss of pay he may have suffered as a result of the discrimination against him, in the manner set forth in "The remedy" section of the Intermediate Report.

(c) Post in conspicuous places in its business offices, meeting halls, and all places where notices to members are

customarily posted, copies of the notice attached hereto marked "Appendix."[7] Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by the Respondent's authorized representative, be posted immediately upon receipt thereof and be maintained for 60 consecutive days thereafter. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material.

(d) Sign and mail sufficient copies of said notice to the Regional Director for the Second Region for posting by Ward Baking Company, at all locations where notices to its employees are customarily posted, if the Company is willing to do so.

(e) Notify the said Regional Director, in writing, within 20 days from the date of receipt of this Intermediate Report and Recommended Order, what steps it has taken to comply herewith.[8]

Dated at Washington, D. C., March 26, 1963.

IVAR H. PETERSON,
Trial Examiner.

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[7] In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[8] In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify the said Regional Director, in writing, within 10 days from the date of this Order, what steps it has taken to comply herewith."

APPENDIX

NOTICE

TO ALL MEMBERS OF LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS UNION AFL-CIO, AND TO ALL EMPLOYEES OF WARD BAKING COMPANY

PURSUANT TO
THE RECOMMENDED ORDER OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

WE WILL NOT cause or attempt to cause WARD BAKING COMPANY to discriminate against its employees in violation of Section 8(a)(3) of the Act, as amended by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL NOT in any like or related manner restrain or coerce employees of WARD BAKING COMPANY in the exercise of rights guaranteed them in Section 7 of the Act, except to the extent that such rights may be effected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL notify WARD BAKING COMPANY that we have no objection to the reinstatement of Charles Fisher, and will serve a copy of said notice on Charles Fisher.

WE WILL make Charles Fisher whole for any loss of pay he may have suffered because of our action in caus-

ing WARD BAKING COMPANY to discriminate against him.

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS UNION, AFL-CIO.
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date hereof, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, Fifth Floor, Squibb Building, 745 Fifth Avenue, New York 22, New York (Tel. No. Plaza 1-5500), if they have any question concerning this notice or compliance with its provisions.

APPENDIX C

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement,

whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreements: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee

with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *

Section 203:

(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. * * *

APPENDIX D

Partial List of International Union Constitutions With Clearance, Transfer, Travelling or Withdrawal Card Provisions

Aluminum Workers International Union

Asbestos Workers; International Association of Heat and Frost Insulators and

Automobile, Aerospace and Agricultural Implement Workers of America; International Union, United

Barbers, Hairdressers, Cosmetologists and Proprietors' International Union of America; Journeymen

Bill Posters, Billers and Distributors of the United States and Canada; International Alliance of

Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers; International Brotherhood of

Bookbinders; International Brotherhood of

Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America; International Union of United

Brick and Clay Workers of America; United

Building Service Employees' International Union

Carpenters and Joiners of America; United Brotherhood of

Chemical Workers Union; International

Communications Workers of America

Distillery, Rectifying, Wine and Allied Workers' International Union of America

Electrical, Radio and Machine Workers; International Union of

Electrical Workers; International Brotherhood of

Elevator Constructors; International Union of

Engineers; American Federation of Technical

Engineers; International Union of Operating

Fire Fighters; International Association of

Flight Engineers' International Association

Furniture Workers of America; United

Garment Workers of America; United

Glass Bottle Blowers Association of the United States and Canada

Glass Workers' Union of North America; American Flint

Government Employees; American Federal of

Iron Workers; International Association of Bridge, Structural and Ornamental

Railway Carmen of America; Brotherhood

Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; Brotherhood of

Retail Clerks International Association

Shoe Workers' Union; Boot &

Toy Workers of the United States and Canada; International Union of Doll and

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	6
Conclusion	10

CITATIONS

Cases:

Cafero v. *National Labor Relations Board*, 336 F. 2d 115 10

Radio Officers' Union v. *National Labor Relations Board*, 347 U.S. 17 7

Statute:

National Labor Relations Act, Sections 8(b)(1)(A), (2) 5, 7, 9

781-001—65